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ATTAINDER OF TREASON AND CONFISCATION OF THE PROPERTY OF REBELS.

A LETTER TO THE

HON. SAMUEL A. FOOT, LL. D.

ON

THE CONSTITUTIONAL RESTRICTIONS

UPON

ATTAINDER AND FORFEITURE

FOR

TREASON AGAINST THE UNITED STATES,

BY

W. D. WILSON, D. D.,
PROF. &C., IN HOBART COLLEGE,

WITH

JUDGE FOOT'S ANSWER,

IN FURTHER ELUCIDATION OF THE SUBJECT.

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Hon. S. A. Foot:

Dear Sir: Some few days since, while in conversation with you, on the all-absorbing topic of the day — the state and prospects of our country — I expressed my doubts, in which you concurred, whether the opinion, which is so commonly entertained, whether, under our Constitution, Congress has a right to confiscate rebel property for anything more than the lifetime of the rebel who is the owner of it, is correct. You encouraged me to investigate the subject; made some valuable suggestions; and very kindly placed at my disposal the ample resources of your Library. I have, therefore, incorporated the results of my investigation into a letter, which I now take the liberty of addressing to you. This I do with the assurance, that the views I have presented accord, in general, with your own, and with the hope, that it may be of interest to others besides ourselves, and of service to our common country.

This subject is important in more than one point of view. Not only does it come before us as a part of the means of putting down the rebellion and punishing the rebels, but it is important in reference to the immense national debt which we shall have to pay. This debt will, in all its items, amount to more than a thousand millions of dollars. By the last census I see, that the "actual value" of property in the rebel states is, $4,708,252,215 —

say three billions, exclusive of slavery—including Western Virginia, but not including any portions of Delaware, Maryland, Kentucky, Tennessee, or Missouri. A portion of this Western Virginia should not, of course, be included in any confiscation; but there is more than property enough in the other states, viz., Delaware, Maryland, Kentucky, Tennessee, and Missouri, which is held by rebels, and is liable to confiscation, to make up for all that is held by loyal men in the States of Virginia, North Carolina, South Carolina, Florida, Georgia, Alabama, Mississippi, Louisiana, Texas, and Arkansas, which I have included in the above amount. If, now, this property may be confiscated and sold to pay the debt of this war, it will go a good way, at least, towards paying the whole of it. If it may not be confiscated for anything more than the life of its present owners, but very little can ever be realized out of it, and this enormous debt must fall with crushing weight upon the wealth and the industry of our country.

The doubt concerning the right to confiscate the property of those who are now in rebellion, to the use of the United States, arises chiefly from words which occur in Art. 3, Sec. 3, of the Constitution, thus: "*but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.*" These words seem to be quite explicit. They are, however, a little peculiar, and such as that their meaning is not very obvious without some explanation. The most natural and proper recourse in such cases is to the decisions of United States Courts, and failing there, to the debates in the Convention that framed the Constitution, or the cotemporaneous explanations given by those who introduced the language into the Constitution.

But there have been no decisions in the United States courts, or in any others, so far as I can find. The act of Congress passed April 30th, 1790, providing for the punishment of treason, does not include forfeiture of property as a part of the punishment; and all the cases in our courts have been under that statute in such a way, as not to raise the question of the meaning of this clause of the Constitution for adjudication.

On referring to the records of the debates, published by *Elliot*, as well as to "*The Madison Papers*," it does not appear that these words of the Constitution were discussed at all. It is true, that STORY, in his Commentaries on the Constitution, says, in speaking

of these very words: "*forfeiture except during the life of the person attainted*;" that the clause was fully discussed, &c. But on referring to the authorities which he cites, I see that the preceding clause, defining treason, was fully discussed, and amendments proposed—some of them adopted, others rejected, and the reasons given for their adoption or rejection. But his language is rather loose, and it does not appear that anything was said as to the precise meaning of the words, "*corruption of blood*" or "*forfeiture except during the life of the person attainted*," or what was the intention of the framers of the Constitution in inserting them. "*The Federalist*," also, is silent on this precise point.

And so, too, on referring to the reports of the debates in Congress, on the passage of the law of 1790, already referred to, not a word appears to have been said about "*corruption of blood*" or "*forfeiture*" as they occur in the Constitution, limiting the effects of attainder; although there were in that Congress, men who had taken a prominent part in framing the Constitution. The bill appears to have been perfected in the committee of the Senate, and was passed as reported. Of course we have no means of knowing what was said in the committee.

Perhaps this failure of cotemporary exposition or construction, as evidence of the true sense in which the Constitution, in this particular case, is to be understood, is the less to be regretted, from the fact, that the Supreme Court has laid down the rule on this point, (*Wheaton, vol.* 9, *p.* 209), that the framers of the Constitution "must be understood to have employed words in their natural sense, and to have intended what they said,* * * that there is no other rule, than to consider the language of the Instrument, * * * * in connection with the purpose for which it was used."

In the absence, therefore, of all authoritative construction by the courts, and of testimony as to the meaning and intention of the framers of the Constitution, we are left under this rule of the court, to general reasoning upon the natural meaning of the words used, and the light which historic circumstances may throw upon them.

The Constitution, Art. 1, Sec. 9, says: "*No Bill of Attainder or ex post facto law, shall be passed.*"

Attainder, in itself, is considered the blemish or disgrace which follows the conviction of treason, or other high crime.

"Its *consequences* (says *Blackstone*, *vol.* IV, *p.* 381,) are corruption of blood and forfeiture."

The forfeiture or loss of civil rights may be resolved into three elements:

(1.) The right to hold any office or trust under the Government, together with the right to vote at any election for the choice of any officers.

(2.) The right to hold property, especially real estate, as that right in England and in this country, when the Constitution was adopted, was not allowed to any foreigner or alien.

(3.) The right to protection, in case one should leave the country, for the purpose of traveling or residing in foreign lands.

Thus, the forfeiture of attainder was a loss of all civil rights — all the rights and privileges of citizenship.

The expression, "corruption of blood," grew out of usages connected with the feudal tenures. The fief was an estate in lands held from a superior lord, on condition of fealty, (fidelity), homage, and military service. It is highly probable, that these fiefs or estates were at first granted as personal favors and only for life. But in the troublous and confused times of the early settlement of the kingdoms of Europe, nothing was more natural, than that the son of the vassal should succeed to the fief or estate of his father, if he was worthy of it, and capable of performing its duties. In this way, a usage grew up, by which the inheritance of the fief, with its titles and duties, came to have the force of law, and very generally prevailed, if it did not become quite universal. If, however, the vassal at any time failed of his duties, and came short in his fidelity; still more, if he should array himself against his lord, he, of course, forfeited all that he had received, not only his own estate and rights in the fief, but the rights of his heirs, whatever they might be, to succeed by inheritance to what he had lost. Under the Norman kings in England, says Hallam, ("View of Europe," chap. II, p. 11), these "absolute forfeitures came to prevail, and a new doctrine was introduced, '*the corruption of blood*,' by which the heir was effectually excluded from claiming his title at any distance of time through an attainted ancestor." This, of course, reduced them to the condition of serfs or slaves, with no rights which the more privileged classes were bound to respect. The idea was, that treason implied a baseness of "blood," or of nature, which

rendered the whole line of descent from the person attainted, unworthy of personal confidence or public trust — too base, in fact, to be anything but slaves.

*In England, attainder might befall a man in either of four ways:

(1.) By confession and abjuration of the realm.

(2.) By verdict of jury, founded on proof of guilt.

(3.) By outlawry, where the guilty person either fled or hid himself so as to be out of the reach of legal process.

(4.) By bill of attainder. This was a bill passed in Parliament in the same manner as any other law. It named the person or persons to be attainted, declared them guilty, and pronounced sentence. It might, like any other bill, be passed by a bare majority, and for the most part, the accused was attainted for an act which was no crime, and against which there was no law when the act was performed, or the words uttered, for which he was condemned.

Nor was this all. It was not an uncommon practice to pass bills of attainder against a man *after he was dead.* These bills of attainder were a most powerful engine of tyranny and injustice. They might be passed against any political opponent who might happen to be in a minority; or against any man, after he was dead, whose property the King or Parliament might wish to secure. This most odious engine of despotism has been abolished in this country. Here, "*no bills of attainder may be passed.*" But attainder itself — that is, loss of political and civil rights — is not abolished in this country. It may be inflicted as a penalty for treason or rebellion, or other crime, only it must be by trial and conviction; it cannot be by bill or mere act of Congress.

The consequences of attainder, however, were not generally, if ever, expressly declared and pronounced to be the punishment. They were consequences, which the sentence, pronounced by the court, or enacted in the bill, was said to "*work*," or draw after it. Just as with us — a man convicted of larceny, for example, and sentenced to the State Prison for a term of years. Nothing is said in the sentence of the court about loss of the society of his family — the control and management of his private affairs — the right to vote and be elected to office, &c.; and yet, all these are

*Of course, this idea was modified as the feudal tenures passed away, and the rights of the natural born subjects began to be recognized by the English laws.

involved in the sentence. The sentence, by its very execution, "*works*" these consequences.

Now let us look at the other clause of the Constitution in which attainder is spoken of. [Art. III, § 3.] Here "*treason*" is defined, and it is declared, that "no person shall be convicted of treason except by the testimony of two or more witnesses to the same overt act, or on confession in open court."

To be *punished* for treason, therefore, in this country, one must be convicted, either by proof, or "confession in open court." It cannot be done by, 1st, Outlawry; or, 2d, By bill; as under the English law.

It must be remembered, however, that it is the *punishment* for treason that we are speaking of, and to which these restrictions of the Constitution apply, and not the mere *arrest* of one suspected of treason. There is no restriction imposed upon the power or right *to arrest and detain* any persons who are guilty of treason, or are suspected on sufficient grounds, any more than in the case of other offences.

The next clause of the Constitution goes on to say, "Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted."

It seems not unlikely, that the framers of the Constitution, in accordance with the general policy of our Government, meant in this clause to declare, that the punishment for treason, whatever that might be, should not involve or "work" evil consequences to the guilty, any further than they might, 1st, be expressly declared in the words of the sentence passed upon him by the Court; or, 2d, *necessarily* involved in the execution of that sentence. These consequences, as we have seen, were of two classes—"forfeiture of rights," and "corruption of blood." One of which, viz., corruption of blood, is wholly abolished by our Constitution.

Under the English law, the traitor was put to death with circumstances of unusual cruelty; his bowels were taken out, while he was alive, and burnt in his presence, with other elements of barbarous ferocity which need not be recalled here. And so far were these notions of corruption of blood carried, that the children must lose forever their right of inheritance through the guilty man, who was regarded as a broken or lost link in the chain that connected them with the past.

It will, doubtless, go far to account for this barbarity, to consider that treason was not regarded, under hereditary monarchs, as chiefly or mainly, a crime against the people or the public welfare, but as a crime against the King. Not only resistance to the laws of the land, or the King's laws, but any word or act that might be regarded as in any way disrespectful to him, tending to bring him into disrespect or contempt, or disapproving of any of his acts or measures, might be made into "*constructive treason*," at least, and punished as such by bill of attainder, if not by conviction in open court.

But in this country, we take a different view of the matter. Treason has been limited to "overt acts" of war against the legitimate authority of the United States. The punishment for treason has also been modified, and stripped of all unnecessary cruelty. We have abolished "corruption of blood" altogether, and adopted the humane doctrine, that no man shall be made to suffer unnecessarily for the crimes of another. And in the prosecution of this doctrine, we have also placed some restrictions upon the other consequences of attainder — the forfeitures. With us, attainder shall "work no forfeiture, except during the life of the person attainted." What is the import of this restriction?

I think that this language is used all along with reference to English law and usages, and was designed to abolish some things which were practiced under that law. Does it then prohibit the absolute confiscation of the property of the convicted traitor, or an alienation of it, not during his lifetime only, but from him and his heirs, forever? Many think so, but I do not.

(1.) In the first place, the expression "*work* * * * *forfeiture*," shows clearly, that the framers of the Constitution were not, in this case, speaking of what might be *included in* the punishment as a part of it, but only of certain consequences which it might "*work*," although not necessarily involved in it. In this view of it, the Constitution would not prohibit the confiscation of property from being a part, of "the punishment," which Congress has the "power to declare" against the traitor. The Constitution provides, that *if* confiscation is to ensue, it must be as a part of the punishment included and expressly declared in the sentence of the court, by which he was convicted; it could not be permitted to follow, as a consequence of that punishment or sentence.

But, is the property thus alienated, gone forever from his heirs and his family, by virtue of the forfeiture? In England, they have two grades of treason: high and petit treason. But in this country, we have no petit treason; and the only thing that, under our Constitution, we can recognize as treason against the United States, is what they called high treason. Under the English law, in all cases of high treason, the alienation was absolute.

(2.) The word "forfeiture," which is used in this connection, has a significant bearing upon the point before us. It is used in two senses: one concrete, and the other abstract. As a concrete term, "it denotes," says *Webster*, "that which is forfeited," and so *Worcester*, "the thing forfeited." But as an abstract term, "it conveys," says *Webster*, "the act of forfeiting; the losing of some right, privilege, * * * by an offence or crime. * * * In regard to property, the forfeiture is of *the right to possess*, * * * but not generally the actual possession, which is to be transferred by some subsequent process." So *Worcester*, "(*in law*), the act of forfeiting: a loss of property, right, or office, as a punishment for some illegal act or negligence." Hence, the word denotes, in this connection, an instantaneous act, and not a continuous condition. In the other sense of the word "forfeiture," meaning thereby, the thing that is forfeited—to "work forfeiture" would be ungrammatical"; it should be, "work *a* forfeiture," and in that case the language could be understood to mean only *to bestow labor upon it*, as one does upon his farm; a thing which "attainder" could not do.

If we pass from the "natural sense" of the word "forfeiture," to consider the nature of the operation, we shall find the argument equally clear and strong, as I think, in favor of the view which I am presenting. Considered in this light, forfeiture implies not the punishment of the crime, but some of the consequences of it. For example, take the case of smuggling—the goods smuggled are forfeited; but the smuggler is liable to punishment besides, and totally independent of the value of what he may have lost by his forfeiture. In some of the states, the man who sells liquors without due license, not only forfeits the liquors, to be sold again by public authority or to be destroyed, but he is also liable to punishment by fine or imprisonment, or both, besides the loss of his property, (the liquor), by forfeiture.

So, again, a forger may have many valuable tools, but the forfeiture of them is considered, in the eye of the law, as no part of the punishment of his crime.

We must carefully note, that it was not the property merely of the person attainted that he lost, but his right to property. What he had went with his right to hold it, of course. Thus, *Wooddesson*, (Lect., vol. II, p. 259). "If a son be attainted of treason during the life of his father, donee in tail, and die, having issue, and then the father dies, the estate shall descend to the grandchildren *secundum formam doni*, notwithstanding the attainder; *but it is otherwise in case of a fee simple.*" They took the estate if it was entailed to them, not in consequence of his having had any estate in it, but because it was given to them by an ancestor further back than the attainted person, and was theirs according to the form of the gift. But if the estate was held in fee simple—that is, if it were absolutely his own, no other person at that time having any estate in it or right to it, as wife by dower, child by inheritance, the case was otherwise, says WOODDESSON, that is, the forfeiture was absolute, and his heirs could not come into possession of it after his death. So also *Blackstone*, (vol. IV, p. 385). "In the case of petit treason, the offender forfeited all his personality absolutely, and his lands in fee simple to the Crown for a short time—a year and a day, and *after that*, 'by way of escheat to the lord.' But it was gone from the offender and his heirs forever. In case of high treason, however, the guilty party 'forfeited to the King all his lands, &c., whether fee simple or fee tail, to be forever afterwards vested in the Crown.'" P. 381.

I am well aware that the English laws concerning treason, attainder, &c., have been greatly modified since the adoption of our Constitution, and even before its adoption, as for example, 11 and 12 W. III; 7 of Anne. By the Statute 54 of Geo. III, passed some twenty-five years after the adoption of our Constitution, the English have taken very much the same grounds as we had done a quarter of a century before, in regard to the punishment of traitors. Still, however, in citing English law as explanatory of our Constitution, we must take the laws as they were at the time when our Constitution was framed, and not as they may have been made since that time.

We must remember, that in England, a large part of the land was held by some form of entail, so that in reality the traitor, for the most part, would have only a life estate in it, and this, therefore, was all that he could lose by forfeiture. The property entailed would go to the heirs, not, however, as *his* heirs or *through* him, but as it were *over* him and from some ancestor who had entailed it, and, in the language of Wooddesson, "*according to the form of the gift.*" His crime did not affect their rights in this case, since the property came to them independently of the fact that he had ever had an estate or interest in it.

Hence no argument can be drawn from the fact, that in some cases lands in which the criminal had an estate during his life, did, after his death, come to his children. The lands came to them, if at all, because they were entailed, or were estates in gavelkind—that is, they were either entailed to some particular heirs or line of heirs—or to all heirs by what was called gavelkind. But if the estates were held in fee simple, the forfeiture was absolute. Under the English law, a man forfeited what he had and nothing more—his life estate, if that was all he had, and the entire property if he held in fee simple, or was absolute owner. But the estate or interest which the criminal had in the lands was never restored. It could not be restored, for it was either a life estate, or an estate in fee, and the man to whom it had belonged, being dead, it could not have been restored to him. He was beyond the possession and use of it. His interest in it and right to it alike had terminated by that act of Providence which removed him from among his fellow men. Hence, the only forfeiture which, in the nature of things, can, by any possibility, extend beyond the life of the person attainted, is the forfeiture of rights implied in the corruption of blood. But in this country, a man's rights are born with him, and they die with him. His children have the right to inherit what he leaves intestate. But if he leaves nothing which is legally his own, they have no right to what he had previously owned and lost, whether by gift, the misfortunes of business, the waste of prodigality, or the fines and forfeitures consequent upon his crimes. To that extent, his children must suffer for his acts.

I have one suggestion more to make, in regard to the nature of a forfeiture. It is not a continuous act, so to call it. It is an

act which, like a sale, is made once and at a definite moment, and though the article which changes owners by the sale, remains sold, yet the sale itself cannot be said to remain. So a forfeiture: it takes place at a given time and the article remains forfeited forever, and forever alienated from him who owned it before, and the forfeiture cannot be said to remain, and *to keep taking place.* Hence a forfeiture, after the life of the person attainted had come to an end (and though it might be a forfeiture for his crime), could not be a forfeiture of anything that was his. It would not be his forfeiture at all. It could not be said to be a forfeiture of *his* property or rights; *that* must take place during his life, if at all. And hence the Constitution, in prohibiting forfeitures, except during the life of the person attainted, could not be prohibiting or limiting a forfeiture of the estate of the traitor, but only declares that the forfeiture must take place during his life, and must not be visited upon the property of his children, after it had become theirs. What gives emphasis to this view, is the fact, that in England, at the time of the adoption of the Constitution, a man might be attainted *after his death.* In that case, of course, all the penalties and forfeitures would fall upon his children. His attainder would not only work a corruption of his blood, but it would be a forfeiture of their property, which would be, of course, therefore, a forfeiture after the life, or rather after the death of the person attainted. But in this country, and under our Constitution, the attainder works no corruption of blood; it works no forfeiture after the death of the guilty person. The punishment must fall upon him and his property *while it is his;* it cannot fall upon it, after it has become theirs. Suppose we now insert the word "sale" and see how the Constitution reads: "No attainder of treason shall work a *sale,* except during the life, &c." Would anybody suppose for a moment, that the language was designed for anything more than to protect the property of the heirs? Would anybody suppose, that the property sold before the death of the traitor was to be restored to his heirs after his death, by virtue of these words of the Constitution? Clearly not. The matter is too plain to admit of a doubt. Forfeiture is a conveyance; it is one mode of changing title. It is so reckoned by Blackstone, and all the elementary writers, whose works are within my reach. But as a mode of conveyance, it must be an instant act. One cannot be always or permanently acquiring,

or always losing, the same title. Like sale, escheat, &c., forfeiture must be instantaneous and completed at the time.

It may be objected to this view of the meaning of the clause of the Constitution under consideration, that it is makes the phrases "corruption of blood," and "forfeiture, except during the life of the person attainted" to mean precisely the same thing, and thus a tautology, which it is not to be presumed will exist in the language of that Instrument. There would certainly be great force in the objection if it were well founded.

But the phrases are not synonymous. There may be corruption of blood, without forfeiture beyond the life of the person attainted, and forfeiture, without corruption of blood. In the former case, the children would have the right to acquire and hold property, to vote, &c., but they could not inherit property from a grandfather through their father who had been attainted. In the latter case, the children might be involved in the attainder so far as the loss of their father's property is concerned, while collateral heirs, as children and descendants of a brother of the attainted traitor, might inherit property from their common ancestors — say, their grandfather — even when in order to do so, it would be necessary to trace the title through the attainted person. The attainder, in this case, would affect his children, but not his collateral heirs.

There is one other consideration that seems to confirm this view of the Constitution. It will not be supposed for a moment, that the framers of the Constitution intended to extend to rebels and traitors any immunity beyond what might be extended to other criminals. The idea is absurd. But in other cases, we punish by forfeitures and fines as well as imprisonment, &c. The court may sentence a man to a fine for a definite amount. This fine may take all his property, personal as well as real, and yet nobody ever supposed, that *that* was not an alienation forever, or that the property must be restored to the heirs of the guilty man after his death. The transfer is absolute, and the title acquired in this way is as good for the holder of such property as any that is known to our laws.

Hence, there are cases constantly occurring, in which punishment for crimes does work alienation of property, extending beyond the life of the person convicted and disgraced by the crime. Why should an exception be made in favor of traitors

and rebels? Is their crime less heinous than forgery or horse-stealing? Did the fathers of our country intend to deal tenderly with them; to make of treason a light thing; to hold out inducements and temptations to it, by shielding those, who might endanger the nation's welfare and imbue their hands in the blood of their fellow citizens, from the penalties that might fall upon other and lighter offences? The question needs no answer. And yet this is the result of maintaining, that the Constitution prohibits the confiscation of the property of rebels for a period extending beyond their natural lives.

Consider, now, the absurdity of taking the real estate of rebels, in part punishment of treason, if we have no right to alienate it beyond the period of their natural lives.

The penalty for treason being generally the death of the traitor, the execution of the sentence of the law upon his body would be likely to follow very soon after the sentence itself was passed upon him. If, now, we can forfeit his real estate only for his lifetime, forfeiture really amounts to nothing — for it could extend only from the time of the sentence to the execution. It would be no punishment at all—no damage to his heirs, and no benefit to the community which he had so deeply wronged. We certainly cannot suppose, that the framers of our Constitution, among whom were some of the best scholars and the most learned lawyers of the age, could have intended any such senseless absurdity as this. Nor is this all, the clause of the Constitution in question makes no distinction between personal and real estate. The words are "*or forfeiture except*," &c., and therefore the restriction, whatever it be, applies as well, and with the same binding force, to personal effects, mere chattels and household goods, many of which perish in the using, as to real estate.

I pass to another very important consideration. I have several times alluded to the general policy of our Government to make every one responsible for his own acts and not to visit the sins of the father upon the children. And it is worth while to consider, how this interpretation of the Constitution harmonizes with that idea, and secures its complete realization in regard to the subject of treason at least. In England a man's treason might be visited on his children in either of two ways, as we have seen, namely:

(1.) By corruption of blood, in consequence of which they could inherit nothing from him, or even through him from their ancestors.

(2.) By bills of attainder *passed after the death of the offender*, and when his property had passed into the hands of his heirs, who might be perfectly innocent of his crime.

I have already spoken of the English law as allowing attainder after the offender himself was dead. Now, nothing seems more natural, than to suppose the framers of our Constitution had these *post mortem* visitations upon the posterity of the offender in mind, when they added the words in our Constitution: "*or forfeiture except during the life of the person attainted.*" Fortunately, such a thing as attainder after the death of the offender is entirely unknown in practice in our country. And it does not appear to have occurred, very generally, at least, to the minds of our people, that that English practice could have had anything to do with the insertion of this limitation to forfeiture in our Constitution. But, at the time of the Revolution, such cases were of comparatively recent occurrence. "*Many such* attainders," says Woodesson, (Lec., Vol. II, p. 623,) "have been made." And a recurrence to English history shows, that it had been a very frequent resort of the Crown, not only for the sake of punishing offenders, but as a means of supplying the royal exchequer, and of providing for the reward and ennoblement of a favorite. In fact, it was part and parcel of the policy, of which bills of attainder were another part, for making the power of the monarchy complete, and so breaking down the rights of the people, as to make them completely and helplessly submissive to those in authority.

Of the nature and necessity of this, as a principle of feudal tenure and monarchical institutions, it is not necessary to speak at length. There the landed property was for the most part held in large estates, by feudal tenures, and is a part of the policy of the kingdom. If a baron should turn traitor and die on the battle-field in the act of committing his treason, or if he should flee the country and died abroad, there would be no way for the King to recover what was essential to the integrity of the realm, except some process by which he could be attainted after his death. The estate must be recovered to the support of the

crown, and for that purpose, it must be taken from the heirs of the traitor, and this was often done, in order that it might be bestowed upon some favorite—or at least some loyal person, as a reward for services rendered, or as a pledge for the future.

But in this country we have no such element of national policy—no such reason for disturbing the rights of the dead or the rights and possessions of the living. If a rebel is to be attainted, it must be while he lives; if his property is to be forfeited for his treason, it must be while it is his, and not after it has passed, by his death, into the hands of his heirs, or belongs of right to other persons.

Now, by the interpretation which I suggest for these words of the Constitution,—"forfeiture, except during the life of the person attainted,"—we secure this beneficent object of the framers of our institutions, and *not without*. For, on my interpretation, the forfeiture being regarded as a mere act or mode of changing the title to property, effects the change and has no longer an existence. And, as the Constitution requires that the act should take place while the offender lives, it forbids its taking place after he is dead. Otherwise, what was manifestly the object of the framers of the Constitution and the obvious policy of our Government, would not be secured. Their intention would be only partly expressed and not effectually accomplished. But on my view, the work is complete, the theory is fully carried out, fully and perfectly expressed in all its parts and proportions.

I think that we have thus fulfilled the two conditions of the rule laid down by the Supreme Court and already cited.

(1.) The word "forfeiture," in its most "natural sense," denotes an *act* of alienation or change of title to property, and in itself no more implies a return or restoration of the property to the party from whom it was lost by the forfeiture, than a sale, or any other mode of changing the title whatever.

(2.) "The purpose for which the word was used" was manifestly to protect the children and heirs of the guilty man from any visitation of his sins upon them; from being held in any way responsible for crimes of which they were innocent, in which they had no participation, and against the commission of which they had no means or power of influence.

The loss of his property, it is true, might be a damage to them. And so would the loss of his life, by the public execu-

tion to which he was to be condemned. And in the same way, his want of capacity to take care of his property, his vices and prodigality, against which no law could protect him, might impoverish them. And this is only a part of the inevitable consequences of vice and crime — a part, if one chooses so to regard it, of the penalty with which not only states, in their sovereign capacity, as administrators of their own laws and sense of justice, but society also; and, we may add, God, in His Providential government of the world; visits the offenders against the laws of righteousness and justice. And the prospect of such consequences, as well as the known certainty that they must and will inevitably follow, are among the most powerful motives that can act upon the human heart to deter men from the commission of crime. And in this view, whatever of severity there may seem to be in such a policy, it is a severity which man cannot abolish if he would, and a severity which he should not abolish if he could — for it is but mercy under the sterner form of severity — *this* is mercy. But the other course — the visiting of the sins of the father upon the children, after he has gone to his final account, and cannot appear to answer for and defend himself before his earthly tribunal, is only unmitigated and most unnecessary cruelty.

And there is something peculiarly appropriate in the punishment of treason by confiscation of property. It has been practised, I believe, under every form of municipal law and by every government that has existed. For lighter offences we punish by fine and imprisonment. We take the life of him who has merely taken the life of a fellow-man, with malicious intent. But for the man who has aimed at the life of the Nation, not death only, but utter loss of all civil rights and privileges would seem to be the natural and appropriate manifestiaton of the Nation's sense of the enormity of the wrong that had been attempted against it. Let the people feel how priceless are their blessings under a benign government and a righteous administration of laws. Let them see, in the utter destitution and wretchedness to which they are reduced, who wantonly raise the murderous hand of treason against it — how sacred was that life, the life of the Nation, which they had imperiled — how worse than the midnight assassin and the highway robber is he, who commits treason against that government and those laws which have been for him

and for the millions of his fellow-men, the source of all their earthly enjoyments.

It may not add much to the force of my argument, to remark, that the rebels with these same words in their Montgomery constitution, are applying it in the sense for which I am arguing. They are confiscating the property of loyal men, who may happen to own real estate within their power, and as I understand, with no reservation or remainder to the heirs. As I said, the argument from that source may not be worth much in the estimation of loyal men; but as this interpretation is to act chiefly against them, they ought not to complain of the measure they give. It is certainly no more than fair, that they should be estopped by their own acts and compelled to abide by the construction which they have put upon the law. It may, indeed, be hard upon their children so to confiscate their property, but the payment of the expenses of this war is a hardship that must fall upon somebody; it must take somebody's property, and if it does not take that of the rebels, by confiscation, it must take *ours* and that of *our* children by taxation.

In a review of the whole matter, therefore, it seems to me that the four following propositions are clearly proved, and express the provisions of our Constitution on the subject of attainder and confiscation:

(1.) We have abolished bills of attainder altogether, so that there can be in this country no attainder for treason, except "on conviction by due process of law."

(2.) We have stripped the execution of the law upon the traitor of all unnecessary barbarities, such as the revolting scenes that attended the execution of such persons under the English law.

(3.) We have abolished "corruption of blood."

(4.) And fourthly, we have provided that no man's children shall be punished for his guilt by forfeiture of their possessions *after his death.*

I have taken no notice thus far of the debates in Congress on the passage of the Conscription bill, July 17th, 1862. I read them at the time and have refreshed my recollection of them since. The point which I have been discussing was not the one that was prominently before the minds of those who took part in the discussion. They were considering confiscation as a war measure. Still, however, the point was brought up in the col-

loquy between Senators Collamer, Doolittle and Hale on the 23d of April, 1862. Mr. Hale took the view which I have been endeavoring to maintain in this letter. Senator Collamer asks, "Would it not be strange if in framing the Constitution, those who made it should have taken such pains to take care of fee tail estates, of which there were but few here, and let the great body of estates in fee-simple be forfeited?" The simple answer is, that they did not. They were not taking care of *estates* at all, but of the *rights of* men, and they abolished the old doctrine of corruption of blood and forfeiture after the death of the traitor, in order to protect the rights of innocent heirs. That is just the difference between our policy and the English. They legislate to protect estates; we to protect men. Still, however, the general opinion seemed to be against the views entertained by Mr. Hale.

I am inclined to think, that the act of 1790 has done more than the words of the Constitution themselves to produce the general impression with regard to Confiscation. Something of the same kind of views have been entertained in regard to the naturalization of foreigners. Thus *Duer* (Const. Jurisprudence, p. 298), and other authors, on the Constitution, speaks of its "not authorizing any but WHITE persons to become citizens," (the capitals are Duer's,) when not the Constitution, but the act of 1794, limits naturalization to whites of foreign birth. The Constitution says nothing about the color of citizens, whether natural born or naturalized.

But be the origin and cause of this prevalent opinion what it may, the opinion prevailed in the Senate, and it was to meet and accommodate the feeling that grew out of it, that the joint resolution of the two Houses of Congress was passed, limiting the effect of the forfeiture of real estate. The phraseology of that resolution is worthy of notice. It says: "Nor shall any punishment or proceeding under said act be so construed as to work forfeiture of *the real estate of the offender beyond his natural life.*"

But why make the discrimination between real and personal estate? It is true that it is easy to identify and restore the one, and difficult, if not impossible, to restore the other. *But the Constitution makes no such distinction.* Nor did the English law,

so far as I have been able to discover. *Comyn* says (Digest, Vol. IV., p. 222,) "if the owner is attainted for high treason, he forfeits all his lands and tenements, goods and chattels." Even when there was no corruption of blood, the land held in fee simple was forfeited to the King for a year and a day, and after that, it escheated to the lord, and the alienation from the offender and his heirs was as absolute as if there had been only simple confiscation. If, therefore, constitutional scruples were the ground of this resolution, it is difficult to see why it should have taken this form. If the Constitution intended to prohibit forfeitures which should alienate property beyond the lifetime of the offender, this resolution does not go far enough. It should protect personal property as well as real.

Another remark occurs in comparing the words of the resolution with those of the Constitution. The words of the Constitution are: "forfeiture *except during the life*." The words of the resolution are: "*beyond his natural life*." Here is a manifest discrepancy. If Congress meant the same as the framers of the Constitution, why depart from their words? I don't think they could find better ones. But the words of the Constitution, as I have argued, intended, simply, that forfeiture is an act which, by the Constitution, cannot take place except during the life of the offender; how long soever its consequences may last — while the words of the resolution imply, by "forfeiture," not the act, but the consequences of the act; since these could, but that could not, by its very nature, last *beyond* the moment when it became complete. This discrepancy is certainly significant, and shows, it seems to me, most clearly and conclusively, that either Congress did not pass this resolution out of regard to the restriction of the third clause of the third article of the Constitution, or else that they had in their minds, as the meaning of the clause, an idea, which the framers of the Constitution never intended to express by the words which they used.

And this brings me again to the opinions already expressed, namely, that the prevalent views on the subject are based on the act of 1790, rather than upon the Constitution itself. In passing that act, just as in providing for the naturalization of foreigners, Congress clearly did not aim to interpret the Constitution, and to go to the utmost extent which it would allow. They aimed rather

to keep clearly within its prescribed limits, leaving a reserve of power for more pressing necessities and greater emergencies.

I am wellaware of the grand principle declared by the Supreme Court, (1 Cranch, 299,) that any usage under the Constitution which arose at the time, and has been continued ever since, *as an interpretation* of the Constitution, will fix upon it a meaning that ought not ever to be departed from. But the statutes, just referred to, cannot be regarded in the light of an exposition or interpretation of the Constitution, although they were passed, in part, at least, by men who had participated in the formation of that instrument. They are an expression of their sense of its meaning, so far as those acts imply a belief on their part that they had a right to pass such acts, that is, acts limiting the punishment of treason to the death of the offender without forfeiture of his property, and naturalization to white persons of European descent. But those acts, neither by their phraseology, nor by the act of passing them, imply any doubt on the part of the men who composed those Congresses, that they had a right to go further and alienate property, real as well as personal, by forfeiture to the government and its use forever.

I have discussed this question simply as a matter of interpretation of the meaning of the Constitution. I have said nothing, and I do not intend to say anything of the expediency of applying, what I conceive to be clearly written, the power of Congress to those who are now in open resistance against the General Government. I should certainly be disposed to deal as tenderly as any one with the masses of the people who have been drawn into this most unnecessary rebellion. But of this I did not design to speak. Let us suppress this rebellion, as I have no doubt we shall, and we may congratulate ourselves and the world upon the ultimate and final triumph of the principles of political freedom and self-government—a Government which is "of God and not of men," and under which, in the language of the Declaration of Independence, "all men are" in fact as well as in theory, "created equal and ordained by their Creator with the inalienable rights of life, liberty and the pursuit of happiness."

And in conclusion, my dear Judge, permit me to say, that I should hardly have undertaken the discussion of subjects which properly belong to your profession, but for the consideration, that

we live in troublous times, when our country is in need of the services of all her loyal sons—in times when we should not be too fastidious about mere forms of decorum and professional courtesy — when he who can say a word or do a deed for his country's cause should not withhold his hand. I have not so learned Christianity as to understand how one can be faithful to his God who is not engaged to his country, and who, after his duty to his God, will not, in every hour of her peril and of her need, rush to her service.

I have the honor to be, my dear Judge,
your friend and fellow servant,
in the service of God and our Country,

W. D. WILSON.

GREENE, N. Y., *March* 24th, 1862.

GENEVA, *March* 29, 1863.

REV. W. D. WILSON, D. D.

Dear Sir — I have read your discussion of the punishment of treason, in the form of a letter addressed to me, with great interest and satisfaction. You are entirely correct in saying that your views accord with mine on that subject, and it gives me pleasure to learn, that my suggestions have been of service to you in your investigation of it.

Our fathers, in framing our Constitution, have provided for us a humane, yet efficient mode of punishing treason. In this, as in everything else, they have done well. To enable us to understand the mode they have marked out for punishing this highest of crimes, we must bring to view and keep before us the modes in which it was punished in England when our Constitution was adopted.

At that time, treason was punished in England in two ways: one, by trial and conviction of the traitor in a court of law; the other, by an Act of Parliament denouncing his guilt and punishment.

These Acts of Parliament, called "Bills of Attainder," were passed against traitors, both living and dead, and denounced

punishments, more or less severe, according to the estimate which the Parliament, who passed the act, formed of the crime of the person against whom it was passed.

When a traitor was tried in court, found guilty by a jury, and judgment pronounced against him, forfeiture to the crown of his property real and personal, and corruption of his blood followed, among other disabilities, as legal sequences of the judgment against him. When a traitor was condemned and punished by an act of Parliament, the punishment was such as the Parliament saw fit to denounce. In case the traitor, thus condemned and punished, was living when the act was passed, the judgment denounced against him was generally, and almost always, death, forfeiture of his property real and personal, and corruption of his blood; and, in case the traitor, thus condemned and punished, was dead when the act was passed, the judgment denounced against him was, forfeiture of his property real and personal, which he owned when in life, and corruption of his blood.

In these modes of punishing treason, which prevailed in England when our Constitution was adopted, three things were most unjust and cruel. They were,

First. Condemning and punishing a man by a legislative act, which not only adjudged him guilty without giving him an opportunity for defense, but declared his acts criminal, after they had been committed.

Second. The blood of the traitor was corrupted, which inflicted an injury only on his innocent heirs.

Third. Passing an act of attainder against a man after he was dead, and forfeiting his property to the Crown, after it had passed by descent to his heirs, and thus punishing his innocent heirs and them only.

Our fathers determined that none of these three iniquities should be practised under the government they formed for us. They put an end to the first one, by the clause in the Constitution which declares that, "No bill of attainder or *ex post facto* law shall be passed;" and to the second and third ones, by the clause, which declares that, "No attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted."

The Constitution confers on Congress "power to declare the punishment of treason." This enables Congress, by prospective legislation, to occupy the whole range of punishment against traitors; and denounce upon them the loss of life, liberty, property, and all civil rights. The only restriction on the exercise of this power, confines it to the guilty traitor himself, and does not allow it to reach his innocent heirs, by corrupting his blood, or forfeiting his property after he is dead.

It appears by a message from the President to Congress, after the confiscation act was submitted to him for approval, that, in his opinion, the clause in the Constitution, viz.: "or forfeiture, except during the life of the person attainted," limited the power of Congress in declaring the punishment of treason, to a forfeiture of a traitor's life interest in his real estate, or in other words, that a forfeiture of his real estate should not operate upon, or affect such estate, beyond the period of his life. Although the President in his message remarks, "that the provision in the Constitution, put in language borrowed from Great Britain, applies only in this country, as I understand, to real or landed estate," yet, with the most profound respect for so high an authority, and with great diffidence in my own professional knowledge and research, I must say, that I neither know, nor can find, anything written or spoken, in this country or in England, showing, or tending to show, that this clause of the Constitution relates only to real property, and does not apply to personal. There is no intimation of any such distinction in the Constitution; nor does there appear to be any reason why the personal property of a traitor should be forfeited absolutely, and his real property only qualifiedly. I speak on this subject freely, as I am sure there are no gentlemen in this country, who would be more ready to admit, and if, in their power, correct an error, than our true and faithful President, and his learned and able legal adviser.

The error which has arisen respecting this clause of the Constitution, proceeds probably from two sources — one, in not giving due consideration to the cruel and unjust mode of punishing treason, which it was intended to prohibit — the other, in omitting to ascertain and duly regard the true meaning and legal effect of the term "*forfeiture.*" Scarcely any word occurs more frequently in the system of jurisprudence which prevails in this country and England. Long before our Constitution was adopted, it had

acquired and still has, a clear, definite, and well established meaning. It simply and solely means a mode of changing title to property. It expresses an act by which title to property passes from one to another. It has all the characteristics of a bill of sale of personal property, and a conveyance of real estate; and with one exception is identical with them. When title to property is changed by bill of sale, or conveyance, the owner parts with it voluntarily for a consideration received. When it is changed by forfeiture, the title is taken from the owner against his will, to punish him for his crime. But in each case, the act of changing title is in itself single, complete and finally ended as soon as performed. If we should substitute in the clause of the Constitution in question, the meaning and legal effect of the word "*forfeiture*," in the place of the word itself, the clause would then read as follows: "Or take from a traitor his title to his property, except during his life." On such a reading it is quite clear, that no more appropriate terms could be used to prohibit taking his property from his heirs after his death. Giving, therefore, to the word "*forfeiture*," its true meaning and legal effect, there would seem to be no doubt about the construction of this clause of the Constitution, and about the purpose for which our fathers introduced it into that sacred Instrument.

It is deeply to be regretted that the resolution explanatory of the confiscation act was ever passed, and if it was necessary to pass it, that it was not passed in the very words of the Constitution. As passed, it reads thus: "Nor shall any punishment or proceedings under said act be so construed as to work a forfeiture of the real estate of the offender beyond his natural life."

The passage of this resolution was, beyond all question or doubt, intended to prevent the confiscation act from being exposed to the charge of violating the clause of the Constitution in question, by subjecting the provisions of it to the Constitutional restriction, although the language of the resolution may express a limitation upon the act, which the clause of the Constitution does not require.

If the act violates the Constitution, it does so as fully and effectually with, as without the explanatory resolution; for the act forfeits absolutely the personal property of the rebels, and unless it can be shown, that this kind of property is excluded from the operation of this clause of the Constitution, while real

estate is not, the confiscation act clearly violates it. But as the intention of Congress in passing the Joint Resolution is manifest, viz.: to conform the act to the Constitution; our courts will probably apply to the subject the well settled rule of the construction of statutes, which requires courts to carry into effect the intention of the legislature, and hold, that the Joint Resolution means the same thing as the clause in the Constitution, and thus our confiscation act will accomplish the great and salutary objects which Congress designed to effect by its enactment.

The variety of views, the protracted discussions, and the late day of the session, on which the Joint Resolution was passed, probably prevented the new phase of the subject presented by the President; from receiving that full and thorough investigation which it would have received under other circumstances.

The acts of our Thirty-Seventh Congress will fill a volume in our national history, unsurpassed by those of any Congress since the adoption of the Constitution, not even excepting the First One. The faithful, wise and patriotic labors of the majority will give every member of it, an enduring place in the hearts of his countrymen, and his name will be remembered and honored as long as our national flag waves

"O'er the land of the free and the home of the brave."

The wonder is not, that a single resolution may have passed near the close of a long and laborious session, without a close scrutiny of its language, and a full and thorough investigation of its bearings; but the wonder is, that a Congress, sitting and deliberating, as the Thirty Seventh Congress did, amid a terrific civil war, could have fully met every want of the nation, and adopted every measure, which the honor, interests and safety of the country required.

Respectfully your obedient servant,

SAMUEL A. FOOT.